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Nos. 5 and 46

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Supreme Court of the United States

OCTOBER TERM, 1961

MANUEL ARISTEGUIETA, Consul General of the Republic of Venezuela, on behalf of the Republic of Venezuela, *Petitioner*,

v.

THE FIRST NATIONAL CITY BANK OF NEW YORK; FRENCH AMERICAN BANKING CORPORATION; THE ROYAL BANK OF CANADA; FORTUNATO HERRERA; POLINVERSIONES, C.A., a Venezuelan corporation; SILVIO GUTIERREZ; NAPOLEON DUPOUY; PEDRO A. GUTIERREZ ALFARO and LOLA T. DE GUTIERREZ ALFARO, *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FIFTH CIRCUITS

REPLY MEMORANDUM OF PETITIONER RESPECTING MOOTNESS AND DEFERRAL OF CONSIDERATION

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This memorandum will serve both (a) to reply to the memoranda respecting mootness filed by the respondent banks and by the respondent Silvio Gutierrez and (b) to advise the Court as to the current status of the matter in controversy. See Petitioner's Memorandum Respecting Mootness at 7.

I

STATUS OF HABEAS CORPUS PROCEEDING

At the time of the filing of Petitioner's Memorandum Respecting Mootness the extradition defendant had asked leave, in the United States District Court for the Southern District of Florida, to file an amended petition for writ of habeas corpus attacking the legality of Judge Whitehurst's determination of probable cause and his order of final detention of the defendant in the extradition proceeding. See Petitioner's Memorandum Respecting Mootness at 5.

Since then leave was granted to file the amended petition, an order to show cause thereon was issued, returns were made, a hearing held, and on August 24, 1961, after such hearing, Judge William A. McRae, Jr., United States District Judge, entered an order dismissing the petition and discharging the order to show cause. *Docket No. 10,662-M-Civil, United States District Court for the Southern District of Florida.* At the same time the extradition defendant gave notice of appeal to the United States Court of Appeals for the Fifth Circuit, and steps toward the perfecting of that appeal are now under way. The extradition defendant is at liberty on bail pending further order of court.

II

ISSUES IN HABEAS CORPUS PROCEEDING

In the amended petition for habeas corpus, as amplified in the brief and the traverses filed on behalf of the extradition defendant, it is contended, among other things, (1) that Judge Whitehurst's finding of probable cause is not supported by the evidence adduced at the extradition hearing and (2) that Judge Whitehurst had no jurisdiction on the ground (among others) that

Judge Mathes, whom Judge Whitehurst had succeeded as judge in the course of the extradition proceeding, was never legally divested of jurisdiction. On these and other grounds the extradition defendant, in habeas corpus, prays that the matter be remanded to *Judge Mathes* for further proceedings.

In the argument that Judge Mathes never lost jurisdiction in the extradition case and that Judge Whitehurst therefore had no power to act therein, and in other related arguments, the extradition defendant asserts as his premise that, under the extradition statute, an extradition judge does not act as a "court." From this premise he urges that judges in extradition cannot be changed in the course of a proceeding as are judges in "courts." The premise asserted, it will be observed, has a close kinship to certain of the arguments which have been advanced by the respondents in the cases here pending respecting the power of an extradition judge to issue or to approve the issuance of compulsory process to secure evidence for use in an extradition hearing.

It should be noted that, in the habeas corpus proceeding as argued in the District Court, the extradition defendant gave great emphasis to this argument.

III

THE QUESTION OF MOOTNESS

The respondents' memoranda state, quite properly, that habeas corpus in extradition cannot be treated as an appeal or writ of error. The respondent banks' memorandum proceeds to state that, "Clearly, Judge Whitehurst had before him competent legal evidence on which to base his judgment and finding of probable cause," and suggests that, "It is difficult to conceive of" the possibility that there will be a remand to the extra-

dition judge to receive additional evidence. Respondent Banks' Memorandum Respecting Mootness at 4, 5. The respondent Silvio Gutierrez's memorandum merely suggests that any questions involved in the cases here pending "cannot properly be involved in . . . any remand" that could result from the habeas corpus proceeding. Respondent Silvio Gutierrez's Memorandum Respecting Mootness at 3.

The petitioner here agrees, of course, that Judge Whitehurst's finding is sustained by the evidence, and the habeas corpus court also has agreed with that view. The extradition defendant, however, continues to argue to the contrary, the issue will be presented on his appeal to the United States Court of Appeals, and even though the likelihood of his success on this issue appears remote it cannot be certain that he will fail.

Furthermore—and most importantly—the argument made by the extradition defendant in habeas corpus to the effect that the extradition case should be remanded to Judge Mathes on the ground that he never lost jurisdiction (or related grounds) is quite independent of the question of the sufficiency of the evidence to sustain the finding of Judge Whitehurst. In effect, this argument, were it to prevail, would return the extradition case to the exact status it was in when this Court granted certiorari in the cases here pending, *i.e.*, to a status where only the demanding government's evidence had been received, the extradition defendant's case remained to be heard, and the extradition hearing was still in course, with the demanding government able to move to reopen its case for the receipt of evidence from the respondent banks' records or to tender such evidence in rebuttal. While the habeas corpus court has rejected the extradition defendant's view, it is one which certainly will be urged vigorously on the

pending appeal and, while the petitioner here is confident that the appeal will fail, that cannot be certain. Were the extradition defendant's view to prevail, the cases here pending would at once become most lively.

In sum, it simply is not true that at this time the controversy involved in the cases here pending is dead, however quiescent it may be at this particular moment.

Indeed, the very fact that the extradition defendant is now invoking an argument on the question of the jurisdiction of the extradition judge which is so similar to one of the principal arguments made by the respondents in support of their contention that the extradition judge had no power to issue or approve the issuance of compulsory process gives added emphasis to the point made by the petitioner here that a sovereign nation, coming to these shores to seek extradition of an accused fugitive, should not be forced "to relitigate the entire controversy from the beginning" should the habeas corpus proceeding result in renewal of the self-same extradition proceeding. Petitioner's Memorandum Respecting Mootness at 6. It would be ironical, indeed, were the extradition defendant to prevail in his jurisdictional argument, and so to revive the extradition proceeding, after this Court had dismissed as moot these cases in the very same extradition proceeding in which a blood brother of the same argument is critically involved. The sovereign nation, faced with such a paradox, might be pardoned were it to be baffled.

IV

CONCLUSION

The respondent banks agree with the petitioner that, if the cases here are not moot, they should be retained on this Court's docket, with briefing and argument postponed pending the outcome of the habeas corpus

proceeding. Respondent Banks' Memorandum Respecting Mootness at 6. This does seem the wise course. However important in extradition procedural law are the questions here involved, it must be recognized that the possibility of their mootness by a failure of the extradition defendant's appeal in the habeas corpus proceeding is substantial; this Court's time and attention should not be diverted to these cases until necessary. There is nothing in the nature of the controversy or of the records on which it is presented that stales with age.

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